

Lopez was assigned to drill three boreholes with a jackleg drill. (A jackleg drill, sometimes referred to as a "jackdrill," is an air-operated rock drill that has a single support leg or "jackleg".) The shift had begun at 8:00 a.m. and Lopez reached his work area at around 8:30 a.m. After completing some preparatory work not involving drilling, Lopez was ready to drill at about 8:40 a.m. Herrera checked on Lopez at around 9:00 a.m. and stayed with him for approximately 15 minutes. As Herrera left stope 17-3 to go back to stope 17-4, he met Redmond, the shift boss, at the manway leading into stope 17-3. Redmond also was on his way to check on Lopez. Redmond stayed with Lopez for approximately 15 minutes, during which time Lopez was operating the drill. As Redmond left the work area, he met an inspector of the Department of Labor's Mine Safety and Health Administration ("MSHA"), Richard Coon, and one of Cotter's safety and training specialists at the bottom of the manway leading into stope 17-3.

Inspector Coon entered stope 17-3 at approximately 10:00 a.m. and observed Lopez operating the jackleg drill by himself. Coon asked Lopez where his partner was and Lopez informed him that there was no one working with him directly, but that the other two members of the crew, who were in stope 17-4, checked on him periodically. Inspector Coon asked to speak to the other two crew members and sent Lopez to find them. On his way down the ladderway, Lopez met Herrera, who was coming up to stope 17-3 to check on him. Inspector Coon thereafter issued an imminent danger withdrawal order and citation alleging a violation of 30 C.F.R. § 57.18-25. 2/

In his decision, Judge Carlson concluded that Cotter had violated section 57.18-25. Relying on statistical reports concerning accidents involving rock drilling and on testimony from Inspector Coon, he found that an area in which jackleg drilling takes place is one where "hazardous conditions" exist within the meaning of section 57.18-25. <sup>7</sup> FMSHRC at 361-62. The judge applied the reasoning in Old Ben Coal Co., <sup>4</sup> FMSHRC 1800 (October 1982), in which, analyzing a comparable "working alone" standard (30 C.F.R. § 77.1700), the Commission held:

[T]he standard requires [that where miners are working alone where hazardous conditions exist, there must be] communication or contact of a regular and dependable nature commensurate with the risk present in a particular situation.

<sup>4</sup> FMSHRC at 1803. The judge found that the contact that Lopez had with other Cotter employees was insufficient to meet the Old Ben test.

<sup>7</sup> FMSHRC at 365-68. He ultimately held that Lopez was allowed to work alone in an area where hazardous conditions existed without sufficient contact with other miners. <sup>7</sup> FMSHRC at 368.

2/ The withdrawal order was not at issue in the proceedings before Judge Carlson.